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No. 85-163

In the Supreme Court of the United States

OCTOBER TERM, 1985

BALAIR, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners are foreign air carriers that claim injury resulting from a Federal Aviation Administration regulation temporarily grounding certain aircraft. They seek damages from the United States, contending that an international treaty and bilateral aviation agreements between the United States and foreign governments impliedly waived the United States' sovereign immunity.

1. On May 25, 1979, an American Airlines DC-10 aircraft crashed shortly after take-off from Chicago's O'Hare International Airport, resulting in the death of all occupants. In response, on June 6, 1979, the Federal Aviation Administration (FAA) issued Special Federal Aviation Regulation No. 40 (SFAR-40), which prohibited the take-off or landing within the United States of all DC-10 aircraft, including those registered by foreign governments. The regulation remained in effect until July 13, 1979 (Pet. App. 3a-4a).

Petitioners are seven foreign airlines that were affected by SFAR-40. Prior to the rescission of the regulation, several of the petitioners challenged its legality in suits brought before the United States Court of Appeals for the District of Columbia Circuit. That court held that SFAR-40 violated the Convention on International Civil Aviation (the Chicago Convention), the relevant bilateral agreements, and Section 1102 of the Federal Aviation Act of 1958, 49 U.S.C. (1976 ed.) 1502. *British Caledonian Airways, Ltd.* v. *Bond*, 665 F.2d 1153 (D.C. Cir. 1981).

Petitioners then brought this action against the United States seeking damages in excess of $100,000,000 allegedly sustained as a result of SFAR-40 (Pet. App. 4a). The United States moved to dismiss the action on the ground that petitioners' claims were barred by sovereign immunity (*id.* at 5a). Petitioners responded that the Chicago Convention and the bilateral agreements impliedly waived the United States' sovereign immunity. The district court granted the United States' motion, holding that a waiver of sovereign immunity must be express and that petitioners had failed to identify any specific language in the international agreements that waived the United States' immunity (*id.* at 9a). The court of appeals affirmed without opinion (*id.* at 1a-2a).

2. Sovereign immunity principles are familiar and well established. As this Court has stated, " 'the United States, as sovereign, " 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." ' " *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). Thus, " 'this Court has long

decided that limitations and conditions upon which the Government consents to be sued must be strictly observed * * *.' " *Lehman*, 453 U.S. at 161, quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).[1]

Petitioners claim (Pet. 8-9) that the United States has waived its sovereign immunity through the Chicago Convention and other bilateral aviation agreements. However, they have failed to identify any provision of those international agreements that expressly waives the government's immunity from suit. Instead, they argue that a waiver should be inferred "even in the face of textual silence" (Pet. 10) on the basis of the factors articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). See Pet. 8-10.

Petitioners' reliance on *Cort* is completely misplaced. That decision considered whether a corporate stockholder could maintain a private cause of action against the corporation's directors, based on their alleged violation of a federal criminal statute. See 422 U.S. at 68. The *Cort* decision, dealing with implied causes of action against private parties, does not address the waiver of sovereign immunity. Indeed, the *Cort* standards for determining whether federal law creates an implied cause of action are facially inapplicable to determining whether the United States has waived

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[1]Contrary to petitioners' suggestion (Pet. 7 n.3), sovereign immunity poses a jurisdictional bar to a suit for damages. *Lehman*, 453 U.S. at 160. Petitioners are plainly wrong in maintaining that the grant of federal question jurisdiction, see 28 U.S.C. 1331, waives sovereign immunity. See, *e.g.*, *B. K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 724 (2d Cir. 1983). Similarly, the grant of district court jurisdiction over tort actions by aliens alleging violation of international law or United States treaties, see 28 U.S.C. 1350, does not constitute a waiver of immunity. See *Sanchez-Espinoza* v. *Reagan*, No. 83-1997 (D.C. Cir. Aug. 13, 1985), slip op. 8; *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). Instead, the necessary waiver must be found in a separate federal statute or treaty. See *United States* v. *Mitchell*, 445 U.S. at 538.

its sovereign immunity because a waiver of sovereign immunity " '*cannot be implied.*' " *Mitchell*, 445 U.S. at 538 (emphasis added). Nothing in *Cort*, or in subsequent cases interpreting *Cort*, alters the established rule that waivers of sovereign immunity must be express.

Petitioners' reliance on *Patentas* v. *United States*, 687 F.2d 707 (3d Cir. 1982), is likewise misplaced. In *Patentas*, the court of appeals rejected a claim for damages against the United States arising out of the explosion of a tanker that the Coast Guard had inspected pursuant to the Ports and Waterways Safety Act of 1972, 33 U.S.C. 1221 *et seq.* The plaintiffs in that case apparently invoked the *Cort* standards to "imply" a cause of action against the government. The court, citing *Mitchell* and *Testan*, responded that "[t]he government is immune from suit unless Congress explicitly waives that immunity." 687 F.2d at 711. The court added that "*Mitchell* and *Testan* * * * do not suggest that this cardinal principle is modified in any way by *Cort* v. *Ash*." *Ibid.*

3. Petitioners urge that an implied waiver of sovereign immunity should be recognized in the present case to further "international comity" (Pet. 6). They assert that other nations have interpreted the international agreements to permit domestic suits for damages arising out of their violation (Pet. 6-7) and suggest that sovereign immunity principles simply reflect the "idiosyncracies" of American jurisprudence (Pet. 10).

This Court has consistently refused such invitations to "tamper with [sovereign immunity] principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." *Testan*, 424 U.S. at 400. It has long recognized that "where it is proper for the nation to furnish a remedy, Congress has

wisely reserved the matter for its own determination." *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 275-276 (1868). "In the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." *Canadian Transport Co.* v. *United States*, 663 F.2d at 1092. See *Head Money Cases*, 112 U.S. 580, 598 (1884).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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